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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 518.

MARGARET E. ALLRED ET AL.,
Appellants,

vs.

H. L. HEATON ET AL.,
Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States:

Appellants, the women who seek higher education at the state land-grant college and university in Texas, file this Petition for Rehearing under the terms of Rule 58 of this Court, after order dismissing their appeal entered on December 19, 1960.

GROUNDS FOR PETITION.

1. That the reason for dismissing this appeal and the dismissal are incorrect and wrongfully deprive Appellants of the benefits of 28 U.S.C., §1257(2).

2. That the women are deprived of equal protection rights in education under the Fourteenth Amendment while other classes are granted those same rights under similar circumstances.

STATEMENT.

Whoever presented this case to the Court undoubtedly referred to the Agricultural and Mechanical College of Texas as a military college (whose name is now in the process of being changed to Texas State University and Agricultural and Mechanical College, as other land-grant state schools have already done), and by that false label caused this Court to believe that women were trying to crash a men's military college. If those facts were true, this case would not be here. The institution involved is a 100 million dollar-endowed school, among the top five in the South, and the second most costly in the South. It is one of the leading senior universities in the nation.

There can be no argument this time about Appellants' compliance with the appeal statute, if a fair appraisal is made. The judgment appealed from is the affirmance of a trial court judgment expressly declaring the attacked regulation of the school valid as against the Federal Equal Protection Clause, which judgment itself, as affirmed, expressly stated that the exclusion of women bears no reasonable relation to the educational objectives involved, and that

more than half of the students of the school are non-ROTC students.

The judgment involved reads in part as follows:

> "It further appearing to the Court, however, that the law as enunciated by the Waco Court of Civil Appeals in *Heaton* v. *Bristol*, 317 S.W.2d 86, permits absolute segregation in higher education by reason of sex, and that the exclusionary resolution of the College Board of Directors which is given the force of law, and which is here attacked, and *the validity of which is here drawn in question, is not repugnant* to or in contravention of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution on its face and as it is applied, and the decision of the Court must necessarily *sustain the validity of the exclutionary Resolution* still in effect;
>
> "It is, therefore ordered, adjudged and decreed by the Court that the relief prayed for by the plaintiffs and Texas women as a class, which class action the Court permits and allows, be in all things denied under the requirements of the law and that the exclusionary *Resolution be declared in all things upheld as valid and enforceable.*" (Emphasis added). See trial Trans. p. 26.

That judgment was unqualifiedly affirmed by the Court of Civil Appeals (Jur. St., p. A24). It was not dismissed as lacking justiciable controversy, and that judgment now stands as a final judgment by the Texas courts. That was what was *done*, as distinguished from what was *said* in the court's opinion. That is the real decision and not the rationalization. Cf. *United Gas Public Service Co.* v. *Texas*, 303 U.S. 123, 144.

In all fairness, orders of state administrative bodies exercising powers given the force of law are "state statutes" within the appeal statute. This Court has clearly

settled that matter. We attack here an order or resolution of such administrative board, given the force and dignity of Texas law, under which all women, regardless of qualifications, are excluded from this land-grant university. The order itself is attacked. In *Hamilton* v. *Regents of Univ. of California*, 293 U.S. 245, 258, this Court held, in a case involving an order of the Regents of a land-grant university:

> "* * * The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state lawmaking power. * * * It follows that the order making military instruction compulsory is a statute of the State within the meaning of §237a [now 1257 (2)]".

The regulation of the Board of Directors attacked was promulgated in the exercise of the delegated authority of the Board. See *Heaton* v. *Bristol*, 317 S.W.2d 86, 95 (Tex. Civ. App. 1958). Writ ref., cert. den.

We thus have the invidious situation of a State furnishing a certain type of valuable education to men, which is categorically denied to women, and also a situation where college education is offered freely and cheaply to men and refused to penniless women living in the area—several thousand of them right now—with no better reason given than tradition and influence.

The most disheartening experience of my career, as a lawyer about to assume a judicial role, is to learn that the Supreme Court of the United States, which I respect as a Court above all others, obviously characterizes this federal question as "insubstantial" and thus holds that the higher educational rights of these obscure women,

and over the years the same rights of thousands of others, are not worth review by this Court. No argument concerning appellate jurisdiction can be valid. I say this humbly and with respect, but I doubt that this Court in its history has made many rulings so untimely and so clearly thoughtless of the terms of the Fourteenth Amendment and human necessity. One would think that the Fourteenth Amendment was written for men only.

This Court is made up of America's greatest jurists, who respect States' rights. But States' rights are being miscast in this case. Even the reactionary State Court, in a paragraph stricken from its opinion as dictum, recognized the applicability of *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, but it stubbornly refused to apply it, limiting applicability of the Fourteenth Amendment only to Negroes, as Southern courts have been wont to do for years (Jur. St. p. A22-23). Now comes the Supreme Court of the United States, who set the pattern of fairness and who gave the directive of equality of educational opportunity for all, and completely subverts the spirit of its own doctrine, confutes its own friends in the South, and blocks even State Courts who had reluctantly started to move toward the national ideals and ethics of the Supreme Court. A strange paradox, one beyond my comprehension, and one which will forever confound and confuse those who believe in a Federal Union and uniform American rights and opportunities.

It is not often that a group of working women can finance an expensive suit to this Court. The question must be settled. I have volunteered this task, with some Southern criticism, without fee and at great personal expense. But in this task of three years (now wasted) I have found that the people of the South, once educated, will follow the principles of justice and equality if no

preferences are made. My recent appointment to the District Judgeship of the very court whose judgment is now involved, would not indicate from the people any unpopularity for trying to advance the cause of equality of opportunity in the most vital field of this centuary—education. Especially is this true of higher education.

I have little doubt that this Court would hear this case if it could get the "military" label out of its thinking. I assure you that the record will substantiate my statement that military is not involved, and the trial court's affirmed judgment so held.

I am certain that automatic thought-habits concerning women have influenced this and other Courts. Women are not merely sex opposites. They are human beings—persons —who must not be discriminated against in education, with the same right of choice as anyone else. We do not come here crusading for women's rights as such. We come imploring this Court through the majesty of law to help awaken people to the reality of the wholesale waste of female talent, and the necessity of such talent to women and to our nation in this atomic age.

As great men have observed recently, law is the indispensable advance guard of social change. It gives well-intentioned persons a standard to which they can repair. It nudges the indifferent and it tames the hostile. Its encouragement causes women to feel wanted in intellectual fields and thus to succeed. Granting women equality of education at public institutions of higher education where their exclusion is unnecessary, and removing the ancient, restrictive English "boarding-school" thought-habit, backed by the authority and majesty of the Supreme Court, would have untold beneficial effect. And the States would never revolt as they have in the racial field. It would exemplify a civil rights sincerity helpful to the

whole problem. This Court unhesitatingly, after mature consideration, tackled the racial issue, when hundreds of "rational" arguments were made against such a move and such a decision. But this Court was right, and it was right simply because it applied the real Fourteenth Amendment to Negroes as a class. It would have been just as easy to call that question insubstantial too in 1954. These helpless women are entitled to no less consideration if my ideal of Americanism is correct. Please do not make the Fourteenth Amendment a device for discrimination within itself. Right or wrong, the women are entitled to this Court's decision and judgment.

This case can be ridiculed by families who are able to send their children to college. Unfortunately, too many judges have not been through the mud and sweat of life enough to really appreciate these problems. To all of the Justices from a personal standpoint, as well as to me, this question means nothing, and is surely insubstantial. But to literally thousands of women over the years, it is the difference between a college education and none at all. We may fool ourselves and say as rugged individualists that she who really wants an education can get it anyhow. But that is just not true, and empirical data will not confirm it. Nor can real equality and justice be rationalized from that premise.

It is not my place even to suggest policy to this Court. But whoever persuades this Court that it is bad public policy to hear and decide this question, is certainly ill-advised. For what can those who know honestly think, when the Negro is granted every deference possible, and women's identical rights are rejected for decision arbitrarily or as "insubstantial"; what is to be thought of the rejection of a question applying to North and South alike as insubstantial, and one affecting only the South as being

urgent and preferential? Moreover, what is to be thought of casting aside this question, when our chief world competitor, posing as a growing menace to us, maintains a scientific force 35% of whom are women, and when our scientific force constitutes less than 1% women?

I wonder if this Court would dismiss or avoid a Fourteenth Amendment question involving Negroes or Jews as "insubstantial" simply because Negroes or Jews could travel elsewhere and get a good education. Of course not. Like the Court, I abhor invidious or useless discriminations of all kinds, and the people of the South would do so too if the Court would be consistent in civil rights. I am afraid this Honorable Court is violating one of its celebrated principles, with which principle I agree: "• • • the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

We have worked hard as individuals to get this case properly before this Court, on a question obviously of great importance in Texas. Pressure organizations have been rejected. If any word has been hinted that this university will work out its own equality problems, the word is false. That has been the word since 1932, when this dispute first arose, and the school has no intention of doing so, as the record shows. Power has been delegated to a small group of influential men to exclude literally thousands of Texas women from the second greatest school in the State.

CONCLUSION.

The fact that private schools like Harvard, Yale and Columbia exclude women, or can exclude them, is not material to this case. Public schools are a phase of government, and the fact that exclusions may be desirable is immaterial if the citizen meets educational requirements. The principles are different.

The Court cannot properly pass us off as a group of visionary cranks advocating a frivolous question. This is a serious matter in a zone where the political processes will not reach for the equal protection of average women. There never was a time when higher education was more needed by every person. Without action by this Court, Miss Allred now can become an expert waitress or marry a plumber. She might have become a great and useful success. If she fails it can be chalked up to lack of opportunity in the shadow of one of the largest universities in the nation, because somebody on this Court believes that sex necessarily results in educational difference, just as the ancient Greeks thought. I will not accept the verdict that this Court arbitrarily ignores the appeal statute or regards the higher educational rights of penniless (or any) females as insubstantial until this Petition is overruled or rejected. I cannot believe it. It means no more to me financially or politically than it does to you. But I, like many others, am an American with great pride in equal justice under law. By "under law" I mean that appellate rights must be respected and that you have no right to call the educational privileges of a woman "insubstantial" unless you are prepared to do so to a Negro or to any other group. The injury is to the individual. These are mandatory personal rights and pledges.

When I take the Texas judicial bench on January I, 1961, it is my hope that if I ever regard the unequal educational rights of women or any other group at a major institution as constitutionally "insubstantial", I will have the courage to resign, for it outrages my sense of justice. I know that this Honorable Court, regardless of the verdict, however, is in perfect good faith and seeks to and will do justice. A conscientious Supreme Court is the life blood of the nation.

Wherefore, we pray as before; and alternatively, we pray that the judgment of the lower court be vacated or reversed summarily for decision below in the light of *Missouri ex rel. Gaines* v. *Canada*, *supra*, and applicable authority.

Respectfully submitted,

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